Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1615

CHRISTOPHER ANDREW JOHNSTON, a minor, by Robert R. Bryson and Barbara Faye Bryson, his general guardians, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPRINTED REPLACING REPLY BRIEF FOR PETITIONER

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PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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In the Memorandum for the United States in Opposition, reference is made to *Stencel Aero Engineering Corp. v. United States,* No. 76-321, decided June 9, 1977, and it is suggested that that case is determinative of the issues raised in this Petition. What the

Government's Memorandum does not make clear is that this honorable Court, in the *Stencel* decision, clearly states that *Feres v. United States* denies the right to sue under the Federal Tort Claims Act only to "on duty" servicemen. This reference is found in the first sentence of Section 2 of that decision beginning on page three and, again, in the first sentence of the only complete paragraph on page seven of that Slip Opinion.

There is no dispute that the father of Christopher Andrew Johnson was not "on duty" at the time he was killed due to the negligence of non-military personnel working in the flightline cafeteria. The distinction between "on duty" and "off duty" is even more clearly made in the Dissenting Opinion.

> "I cannot agree that the narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended to any category of litigation other than suits against the Government by active duty servicemen based on injuries incurred *while on duty.*" (Emphasis added.)

It is this distinction that the Ninth Circuit Court of Appeals has failed to make in the instant case. The failure to make this distinction caused the conflict with the Sixth Circuit Court of Appeals. *Hale v. United States,* 416 Fed. 2d 355 (1969). The failure to make the distinction also results in the unjustified extension of the *Feres* case to a point where it is contrary to the position of this Court and to the point where it violates the Petitioner's constitutionally guaranteed right to equal protection of law.

It is again respectfully requested that this Court resolve this conflict between the Circuits and settle the issue that is clearly presented by this case.

Dated, Marysville, California,
July 25, 1977.

Respectfully submitted,
JOHN L. GUTH,
Counsel for Petitioner.

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